



**Comments of the Center for Democracy & Technology
On the European Commission Consultation on
Improving Cross-Border Access to Electronic Evidence in Criminal
Matters**

October 27, 2017

The Center for Democracy & Technology (CDT) commends the European Commission for the careful and collaborative approach it is taking to the complex issue of cross-border law enforcement demands for internet users' communications data and content. CDT is a non-profit, public interest organisation focused on privacy and other human rights issues affecting the Internet, other communications networks and associated technologies. With offices in Washington DC and Brussels, CDT represents the public's interest in an open internet and promotes the democratic values of free expression, privacy and individual liberty. CDT has submitted interventions in a number of cases at the European Court of Human Rights that raise surveillance and human rights issues the Commission should consider, including in *Szabo and Vissy v. Hungary* (37138/14), *Big Brother Watch and Others v. the United Kingdom* (58170/13), and *Bureau of Investigative Journalism and Alice Ross v. the United Kingdom* (62322/14). ***The overall theme of our comments is that any measures that the Commission puts in place or recommends to enhance law enforcement access to data across borders should ensure that law enforcement demands or requests meet strict human rights requirements.***

Background

As a result of the advance of technology, law enforcement entities investigating a crime in one country are increasingly seeking data that is held by a communications service provider in another country. Requests for this information made under Mutual Legal Assistance Treaties between countries are the most common method for obtaining this information. But, the MLAT process can be slow and can result in disclosures that are not timely enough to assist in an investigation of a crime that has already happened, or in an interruption of a crime in the planning stages.



CDT believes that the Commission should work to improve the current MLAT system, but is concerned that the system may not be able to scale to meet the current demands placed on it. Accordingly, it is appropriate in our view for the Commission to explore alternatives. At the same time, it is essential that measures that the Commission adopts or recommends do not reduce the protections of human rights by enhancing law enforcement access without adhering to strong human rights standards. We urge the Commission to resist the temptation to create a system in which countries with lower legal requirements for surveillance are able to successfully make demands or requests for data that is today protected at a higher level. Such a result would mark a world-wide diminution of privacy and other human rights.

Standards

Accordingly, the Commission should insist that cross border data demands that it facilitates through its recommendations adhere to strong standards. The [Necessary and Proportionate principles](#), endorsed by over 400 civil society organizations including CDT, outline requirements for data demands and requests that the Commission should consider requiring, including:

1. Legality – data requests must relate to crimes punishable by law;
2. Judicial or other independent authorization and supervision;
3. A high degree of probability of crime and that evidence of crime would be obtained;
4. Particularity – efforts to ensure that only information relevant to the crime is accessed; and can be sought only for a specific person, account or device;
5. The crime be investigated must be a serious crime for which a significant period of incarceration may be imposed;
6. Users must be notified that their information has been sought or obtained, but notice may be delayed in limited circumstances in order to protect the integrity of the investigation; and
7. Only that information necessary to the investigation should be retained. Excess information that is collected will be destroyed or returned.

Each of these standards is supported by one or more decisions of the European Court of Human Rights including *Szabo and Vissy v. Hungary* (37138/14), *Zakharov v. Russia* (47143/06), *Weber and Saravia v. Germany* (54934/00), and *Digital Rights*



Ireland v. Minister of Communications, et al. In addition, the Commission should endeavour to put in place requirements designed to ensure that information that is collected is not used to infringe on other rights, including the right to free expression.

CDT thanks the Commission for considering our views and would be pleased to provide further information and input.